

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
WITH PROOF
OF SERVICE

77-7035

United States Court of Appeals

FOR THE SECOND CIRCUIT

STAFLEX COMPANY
THE HARODITE FINISHING COMPANY INC.,

Plaintiffs-Appellants,

—v.—

PELLON CORPORATION,

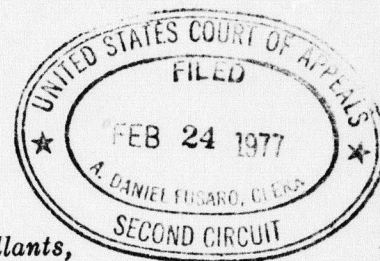
Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS
STAFLEX COMPANY
THE HARODITE FINISHING COMPANY INC.**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

STAFLEX COMPANY
THE HARODITE FINISHING COMPANY INC.,

Plaintiffs-Appellants,

v.

Docket No. 77-7035

PELLON CORPORATION,

Defendant-Appellee.

-----X

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS
STAFLEX COMPANY
THE HARODITE FINISHING COMPANY INC.

PRELIMINARY STATEMENT

This is an appeal from a decision of Judge Whitman Knapp denying Plaintiffs' motion for an order restraining Defendant, until a final determination of this action, from further prosecution of an action filed against Staflex Company, one of the Plaintiffs herein, in the Northern District of Georgia.

ISSUE PRESENTED FOR REVIEW

Did the District Court Judge abuse his discretion in denying Plaintiffs' motion to stay a parallel action involving the same issues on the ground that a change in venue motion should have been brought in the action pending in the Northern District of Georgia.

STATEMENT OF THE CASE

This is a case of coordinate jurisdiction in which a patent owner brought a patent infringement action against the seller of an allegedly infringing article in a remote jurisdiction for the thinly disguised purpose of finding a Circuit hospitable to patents whereafter the seller joined with the manufacturer to bring this declaratory judgment action against the patent owner in this District in which all of the parties have close connections and moved in this second filed action for an order staying the patent owner from further proceeding in the first filed action until a final determination of this action.

The District Court Judge denied the motion in this second filed action, characterizing it as a "change of venue" motion that "should be made in the" first filed action.

From the denial of the motion, this appeal followed.

Pellon Corporation (hereinafter PELLON), a New York corporation having a principal place of business in New York City (A-22,A-11,A-13)¹, alleges ownership of United States Patent No. 3,914,493 (A-23) which covers a product known as a fusible interlining. PELLON brought suit against Staflex Company (hereinafter STAFLEX), a New York partnership with headquarters in New York City (A-18,A-51) by filing an action for patent infringement in the United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. C76-1520A (A-22).

Thereafter, the present action (A-3) was filed by STAFLEX and The Harodite Finishing Company Inc. (hereinafter HARODITE), a corporation of Massachusetts having its principal place of business at Taunton,

1. References to the Appendix are designated by the letter A followed by a page number.

Massachusetts (A-26). This action is for a declaratory judgment of invalidity and non-infringement of PELLON's patent thereby raising issues identical to those raised in the Georgia Action.

STAFLEX sells the fusible interlining alleged to infringe PELLON's patent to distributors and through sales agents to accounts throughout the United States (A-19,20) and all records, executive personnel and technical personnel of STAFLEX are located in the STAFLEX headquarters in New York City (A-20). Its laboratory facilities are also located in New York City (A-68).

HARODITE manufactures fusible interlinings and sells them to accounts throughout the United States. The fusible interlinings which are alleged to infringe PELLON's patent are sold only to STAFLEX. HARODITE manufactures its fusible interlinings in Taunton, Massachusetts. (A-26).

STAFLEX has not denied venue in the Georgia District Court action and PELLON has not denied venue in this action (A-11). HARODITE is not a party to the Georgia action (A-22).

HARODITE has not sold or dealt in the allegedly infringing fusible interlining in Georgia (A-27) and PELLON has not alleged that HARODITE could be made a party to the Georgia action.

The STAFLEX partnership is owned 50% by a subsidiary of a British company known as Staflex International Ltd. and 50% by a subsidiary of HARODITE (A-35,36). HARODITE does not control the activities of STAFLEX and STAFLEX does not control the activities of HARODITE (A-90,91). In fact, the two entities are competitors in the sales of fusible interlinings generally (A-18,A-26,A-88) and have the potential of becoming competitors in the sale of the fusible interlinings which are the subject of this action (A-53,A-89).

Since a complete disposition of the issues as to all interested parties could only be had in this action and because all of the parties, all of the records and all of the witnesses are in and around or close to New York City and Georgia is remote for all concerned including principal patent counsel for the parties, STAFLEX and HARODITE moved the Court below for

an order restraining PELLON from further prosecution of the Georgia action until a final determination of the present action. The motion sought to conserve judicial resources by giving precedence to the action which would finally dispose of all the issues between all parties having an interest.

Judge Knapp denied the motion, not on the ground that there was an insufficient showing for giving preference to the second filed action, but on a characterization of the motion as "essentially a motion for a change of venue on the ground of forum non conveniens" and "that such a motion should be made in - - Georgia where the first action is pending." The Judge noted the argument that a Georgia judgment would not be binding on HARODITE but commented that "there is no reason to suppose it (Harodite) would not be willing to do so (cooperate with Staflex) in any other forum." (A-124)

This appeal ensued on the basis that the District Court abused its discretion by failure to conserve judicial resources and give precedence to the action which has the capability of determining all of the issues between all of the parties in interest.

ARGUMENT

POINT ONE

WISE JUDICIAL ADMINISTRATION
DICTATES THAT THE DISTRICT COURTS
EXERCISE DISCRETION SO AS TO
CONSERVE JUDICIAL RESOURCES AND
COMPREHENSIVELY DISPOSE OF LITIGATION

The leading case on coordinate jurisdiction is
Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.,
342 U.S. 180 (1952) wherein the Supreme Court, Justice
Frankfurter, succinctly stated, at pages 183-184, the
guidelines for deciding motions of this type:

"Wise judicial administration,
giving regard to conservation of
judicial resources and comprehensive
disposition of litigation, does not
counsel rigid mechanical solution
of such problems. The factors
relevant to wise administration
here are equitable in nature.
Necessarily, an ample degree of

discretion, appropriate for
disciplined and experienced judges,
must be left to the lower courts."

In Kerotest, supra. the Court of Appeals for
the Third Circuit reversed the District Court and held
that the Illinois action should go forward and the
Delaware action should be stayed because:

"- - -the whole of the war and all
of the parties to it are in the
Chicago theatre and there only can
it be fought to a finish as the
litigations are now cast. On the
other hand if the battle is waged
in the Delaware arena there is a
strong probability that the
Chicago suit nonetheless would have
to be proceeded with for Acme is not
and cannot be made a party to the
Delaware litigation. The Chicago
suit when adjudicated will bind all

of the parties in both cases.

Why, under the circumstances, should there be two litigations where one will suffice?" 189 F.2d 31, 34.

The Supreme Court affirmed.

While in Kerotest the ultimate result was that the first filed action was given precedence over the second filed action, it is clear that the decision was based on factors of greater overall importance to the issues presented by the actions than the order of filing of the complaints.

The two actions currently pending between PELLON and STAFLEX raising the same issues of patent infringement and validity call for a Kerotest-like evaluation. The Georgia action (first filed) is between PELLON, the patent owner and STAFLEX, the seller of the allegedly infringing goods. The New York action (second filed) is also between PELLON and STAFLEX but, in addition, has as a party HARODITE which manufactures the allegedly infringing goods sold by STAFLEX. HARODITE, like Acme in Kerotest is not and cannot be made a party to the Georgia litigation.

Quite obviously, the New York action is the only one which, when adjudicated will bind all the parties in both cases.

POINT TWO

ABSENT OVERRIDING CIRCUMSTANCES,
FIRST FILED ACTION SHOULD HAVE
PREFERENCE

A litigant's choice of forum should not be lightly overruled. Kerotest, supra.; Mattel Inc. v. Louis Marx & Co., 353 F.2d 421 (2d Cir. 1965), cert. dismissed, 384 U.S. 948 (1965).

In the Mattel case, Marx had brought a declaratory judgment action against Mattel in the District Court in New Jersey and Mattel countered with an infringement action in the Southern District of New York. The New York District Judge granted Mattel's motion to stay the New Jersey action. This Court reversed holding that the lower court abused its discretion in staying the first filed action when there were no reasons to favor the second filed action. This Court noted that motions of this type should be left to the discretion of the District Courts but that:

"- - - discretion is not to be equated with judicial license to decide by fiat." 353 F.2d at 424.

This Court remanded the case to the District Court with instructions to stay the Southern District action until the first filed New Jersey suit has been terminated. A similar result was reached by this Court in Remington Products Corp. v. American Aerovap, 192 F.2d 872 (2d Cir. 1951). In determining whether the District Judge abused his discretion in both Mattel and Remington Products, this Court looked at the factual situation and chronology to determine which action should take precedence in order to comprehensively dispose of litigation and conserve judicial resources. Where the considerations were equally balanced, it was held to be an abuse of discretion to favor the second filed action. Where the District Court properly weighed the significant considerations, it was upheld on appeal.

POINT THREE

CIRCUMSTANCES OF CASE FAVOR
THIS SECOND FILED ACTION

A simple factual analysis shows that this is the only action in which a comprehensive disposition can be had as against all of the parties having an interest. Only here is there present the patent owner (PELLON), the seller (STAFLEX) and the manufacturer (HARODITE). PELLON cannot amend its Georgia action to make HARODITE a party thereto as HARODITE does not reside in the Northern District of Georgia, has not committed alleged acts of infringement in the Northern District of Georgia and does not have a regular and established place of business in the Northern District of Georgia (A-88,89). 28 U.S.C. 1400(b). Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222 (1957); Brunette Machine Works v. Kockum Industries, Inc., 406 U.S. 706 (1972).

PELLON has made the argument that the decision in Blonder-Tongue Lab., Inc. v. University of Illinois Found., 402 U.S. 313 (1971) would have some bearing on the finality of the Georgia action. The collateral estoppel

which arises upon a finding of invalidity of a patent under Blonder-Tongue goes only one way. If the PELLON patent were found invalid in the Georgia action against STAFLEX, PELLON would be collaterally estopped to pursue HARODITE. The converse does not apply. If the PELLON patent were found valid and infringed in the Georgia action, such a finding would not deprive HARODITE of its day in court and a second trial in the New York forum would be required.

Because of HARODITE's part ownership of STAFLEX, PELLON would have the court believe that HARODITE would be bound by a judgment in the Georgia action. PELLON has been unable to demonstrate that STAFLEX controls HARODITE or that HARODITE controls STAFLEX or that HARODITE would in any way control the Georgia action. PELLON's difficulty in proof results from the evidence proving to the contrary.

POINT FOUR

DISTRICT COURT ABUSED DISCRETION
IN NOT CONSIDERING STAY MOTION
ON MERITS AND GRANTING SAME

The motion of STAFLEX and HARODITE to restrain PELLON from further prosecution of the Georgia action

pending a final determination of this action presented the District Court with a case of coordinate jurisdiction and an opportunity to conserve judicial resources and assure a comprehensive disposition of the issues of patent infringement and validity between the parties. The Court below failed on both counts by denying the motion without considering the factual posture of the parties and the issues. While the motion was brought for a restraining order (Rule 65 Fed. R. Civ. P.), the District Court characterized it as one for change of venue and suggested that such a motion should be brought in Georgia. The District Court ignored its jurisdiction over all the parties and the issues and its opportunity to make a determination of the kind mandated by the Supreme Court in Kerotest, supra. It is earnestly submitted that the failure of the District Court to make the determination was an abuse of discretion.

There was ample authority in this District for the Judge to make a determination on a motion of this nature and to accord precedence to this second filed action and stay PELLON from proceeding in the first filed Georgia action. In Delamere Company v. Taylor-Bell Co.,

199 F. Supp. 55 (S.D.N.Y. 1961), Taylor-Bell had first brought a patent infringement action against a customer of Delamere in Virginia. Delamere brought an action here and then moved to enjoin Taylor-Bell from proceeding in the first filed Virginia action. The motion was granted on the grounds that the Southern District of New York was the place where all parties had their principal places of business and all witnesses whose testimony would be relevant on the issues were located in or near New York.

A similar result was reached in Sybil Ives, Inc. v. Helene Curtis Industries, Inc., 249 F. Supp. 865 (S.D.N.Y., 1965). In Helene Curtis, the first filed action was for trademark infringement against a customer in Illinois, the second filed declaratory judgment action was by the manufacturer against the trademark owner. The Southern District Court enjoined the trademark owner from further prosecuting the first filed Illinois action.

In both Delamere and Helene Curtis, the first filed actions were clearly designated as actions against "customers" and PELLON will undoubtedly argue that STAFLEX does not qualify as a "customer" of HARODITE

because it asked HARODITE to manufacture the goods and HARODITE has supplied the allegedly infringing goods exclusively to STAFLEX. However, if STAFLEX is an infringer of a valid patent of PELLON, HARODITE is also an infringer (35 U.S.C. 271(a)). Furthermore, the evidence adduced to date establishes that HARODITE at any time could commence selling the allegedly infringing fusible interlining to others (A-53,A-89) whereby STAFLEX would be just another "customer". The principles as to the "customer action" exception is applicable to the instant situation.

This Court in William Gluckin & Co. v. International Playtex Corp., 407 F.2d 177 (2d Cir., 1969) stated its approval of a thorough analysis of issues of coordinate jurisdiction at the District Court level in affirming the District Court in its issuance of a preliminary injunction restraining further prosecution of a first filed patent infringement action in Georgia against a customer of the manufacturer. The Gluckin case makes eminently clear that its approval of according precedence to the second filed action was not based solely on the "customer action" exception but was based on an approval of the sound and

thorough evaluation made by the District Judge of the factors of substance presented on the motion. This Court's comments on its holding is instructive:

"Woolworth, the defendant in the Georgia action, has consented to be made a party here and is amenable to process here as well. All the litigants involved have offices and principal places of business in New York City. Most of the witnesses whose testimony is relevant reside in the New York City area. Woolworth must look to Gluckin to supply evidence in its defense in the Georgia action. All counsel are from New York and the convenience of the major witnesses would unquestionably be better served by a New York venue.

"Balancing the convenience of the parties and witnesses and with due regard to the weight given to the initial forum, a judgment that the

Georgia suit should be restrained in order that the New York suit may proceed does not appear to be at all unreasonable." 407 F.2d at 180.

In the present action, "the whole of the war and all of the parties to it" are in the Southern District of New York. Kerotest, supra. 342 U.S. at 183. STAFLEX, the defendant in the Georgia action is already a party to the New York action. STAFLEX and PELLON have their principal places of business in New York City. HARODITE's principal place of business is in Massachusetts. None of the witnesses are in Georgia, all of the STAFLEX witnesses are in the New York City area (A-20) and the witnesses of PELLON and HARODITE are located in the New York-Boston corridor. HARODITE is not subject to be made a party to the Georgia action. Principal counsel of all parties are from New York. The similarities between this case and Gluckin, supra. are overwhelming.

It is well settled that to prevail on an appeal from a decision on an issue addressed to the sound discretion of the court below, the appellant must convince

the Appellate Court that the District Court decision was an abuse of discretion. Despite the plethora of cases that discuss this principle, no court has provided us with a comprehensive definition of "abuse of discretion". However, the cases which found or did not find an abuse are instructive and appellants' submit that the case law on the instant issue establish that an abuse has occurred.

In Mattel v. Marx, supra. and William Gluckin & Co. v. International Playtex Corp., supra., this Court first evaluated the facts adduced at the District Court level. The Court then went on to make a determination as to whether the facts clearly favor the first or the second filed action. If one action is clearly favored over the other and the lower court found for the favored action, there would be no abuse of discretion as in Gluckin. If the lower court found against the favored action, there would be an abuse of discretion as in Mattel v. Marx. In the present case, the only fact that favors Georgia is its first filed status and this fact cannot tip the scales when an attempt is made to balance it against the presence of all the parties in the New York action, the location

of all witnesses in the New York City area, the lack of any witnesses in Georgia, the presence of principal counsel in New York, the headquarters of two of the three parties in New York with the headquarters of the third party in Massachusetts, the New York corporation status of two of the three parties with the third party being a Massachusetts corporation and the obvious forum shopping of PELLON which will be touched on in POINT FIVE.

The second basis for finding an abuse of discretion is the refusal of the District Court Judge to consider the issues presented on the motion and to suggest the use of additional judicial resources by suggesting that a further motion be brought in Georgia. Many of our District Courts have been presented with similar motions which have been decided on the merits. Delamere, supra. and Helene Curtis, supra. are examples of cases in the Southern District. A list of similar federal cases would be unending. Examples of District Court decisions which gave precedence to second filed actions are Squeeze-A-Purse Corp. v. Stiller, 149 F.Supp. 60 (N.D.Ohio, 1957);

Sortex Company of North America v. Mandrel Industries, Inc.,
226 F.Supp. 995 (W.D. Mich., 1964); General Tire & Rubber
Co. v. Isocyanate Products, Inc., 270 F. Supp. 868
(D.Del., 1967).

POINT FIVE

PELLON'S OBVIOUS ATTEMPT AT FORUM
SHOPPING SHOULD NOT BE REWARDED

In considering the facts and the relationships of the various parties to Georgia and New York, a single question immediately comes to mind: Why is Pellon so anxious to stay in Georgia when Georgia is so inconvenient for it? PELLON has vigorously fought a trial in the New York forum despite its acknowledged New York location of its headquarters and its counsel. PELLON has continuously argued that is justification for the Georgia forum is that STAFLEX was openly displaying the allegedly infringing goods at a Trade Show in Atlanta. On the other hand, PELLON has never responded to the allegations that when it filed its action against STAFLEX in Georgia it knew that the headquarters of STAFLEX were only 20 blocks from its headquarters in New York City.

The question was simply answered by Judge Palmieri in Rayco Manufacturing Co. v. Chicopee Manufacturing Co., 148 F.Supp. 588 (S.D.N.Y., 1957) at page 592:

"- - - I feel that the real reason for Rayco's coming into New York has been left unsaid, and for apparent reasons. There appears to be a general attitude among the patent bar that the Second Circuit is most uncharitable to patents. Consequently, a party desiring to have a patent declared invalid would probably seek to sue here, while a party suing to enforce its patent in an infringement suit will probably bring it elsewhere, even to the point of suing a customer of the infringer instead of the direct infringer. These tactics are plainly evident from the federal reports and have been recognized by the

Supreme Court.

"I find these tactics deplorable.

That the issuance of a patent should be tantamount to the blowing of a starter's whistle in a foot race among patent counsel is indeed a lamentable spectacle. I believe that a litigant, whether a swift first or as a prompt retaliator, is open to a charge of forum shopping whenever he chooses a forum with slight connection to the factual circumstances surrounding his suit."
(emphasis added).

While PELLON may not admit it, it is indisputable that PELLON wished to bring its patent infringement action in any forum but its home forum.

If, in fact, the Second Circuit is uncharitable to patents, STAFLEX and HARODITE would be the beneficiaries. In view of this possibly fortuitous situation, PELLON attempts to ascribe some sinister motive to STAFLEX seeking

to have the action proceed in its home forum where its principal witnesses reside, where its technical facilities are maintained and where its records are kept. STAFLEX has, furthermore, in bringing this action and pressing this appeal made no attempt to force PELLON into a remote forum.

Finally, in arguing against New York, PELLON has characterized appellants' argument below as favoring Massachusetts over New York since both HARODITE and PELLON have substantial connections with Massachusetts (A-116). Certainly no single forum will be the most convenient forum for each party. STAFLEX chose New York because it and PELLON have its headquarters here thereby establishing maximum convenience for two out of three. Because of PELLON's connections with Massachusetts, a Massachusetts forum would also apparently be convenient for two out of three. PELLON's own argument is self defeating since it makes clear that Georgia is a forum convenient to none and could have been selected for no purpose other than forum shopping.

Such "deplorable tactics" further underscore that a reversal of the District Court is mandated.

CONCLUSION

The facts concerning the issues and the parties establish that only in this action can there be comprehensive disposition of the issues of patent infringement and validity between all of the parties in interest. Consequently, PELLON should be stayed from further prosecution of the Georgia action until a final determination of this action.

It is requested that the District Court be reversed and the case remanded with instructions to stay PELLON from further prosecution of the Georgia action until a final determination of this action.

Respectfully submitted,

BLUM, MOSCOVITZ, FRIEDMAN & KAPLAN
Attorneys for Plaintiffs-Appellants

James K. Silberman
Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

NELSON VAZQUETELLES, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 340 AMSTERDAM AVE.
NEW YORK, N.Y.

That on the 24 day of FEBRUARY, 1977,
deponent personally served the within BRIEF ON BEHALF OF
PLAINTIFFS APPELLANTS STAFLEX CO. THE HAROLDITE FINISHING CO., INC.
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

BURGESS, DINKLAGE & SPRUNG
ATTORNEYS FOR DEFENDANT-APPELLEE
600 THIRD AVE
NEW YORK, N.Y. 10016

Sworn to before me this

24 day of February, 1977

Nelson Vazquetelles

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

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